

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX
FOR APPELLANTS

United States Court of Appeals

363

FOR THE DISTRICT OF COLUMBIA

—
No. 9121
—

*United States Court of Appeals
for the District of Columbia*

FILED MAR 15 1946

Joseph W. Stewart

BAKERY SALES DRIVERS LOCAL UNION No. 33, ERK
AN UNINCORPORATED ASSOCIATION, AND CHARLES M.
ANDRE, *Appellants*,

vs.

A. WAGSHAL, TRADING AS "WAGSHAL'S DELICATESSEN",
Appellee.

—
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

BAKERY SALES DRIVERS LOCAL UNION NO. 33,
AN UNINCORPORATED ASSOCIATION, AND CHARLES M.
ANDRE, *Petitioners*, vs.

A. WAGSHAL, TRADING AS "WAGSHAL'S DELICATESSEN",
Respondent.

PETITION FOR ALLOWANCE OF SPECIAL APPEAL AND MOTION TO REVERSE

Come now petitioners, by their attorneys, pursuant to Rule 11 of this Court, and pray this Honorable Court to allow a special appeal from the orders entered by Judge Alan J. Goldsborough in the District Court of the United States for the District of Columbia on September 7, 1945, overruling petitioners' motion to dismiss the complaint in *A. Wagshal, trading as "Wagshal's Delicatessen" v. Bakery Sales Drivers Local Union No. 33, an unincorporated association, and Charles M. Andre*, Civil Action No. 30226, and restraining the defendants therein from picketing or in any other way interfering with the operation of plaintiff's business. Petitioners further move that, should the special appeal be allowed, the orders complained of be simultaneously reversed.

Notice of Intention to Apply for An Allowance of Special Appeal was filed in the District Court of the United States for the District of Columbia on September 11, 1945.

On September 10, 1945, petitioners also took a general appeal under Section 10 of the Norris-LaGuardia Act. Peti-

tioners hereby request that, in the event this Court allows the special appeal, the record in the general appeal be considered as the record in this special appeal.

Summary Statement of the Case

Plaintiff is the owner and operator of a delicatessen which is also engaged in serving meals to the public. Defendants are a local labor organization of bakery drivers and its business representative, a Mr. Charles M. Andre. The complaint (A copy of the complaint is attached hereto as Exhibit "A" for the Court's convenience. The relevant allegations will be quoted and commented on under petitioners' "Argument", *infra*.) alleged certain difficulties between defendants and plaintiff, pursuant to which defendants engaged in picketing and boycotting against plaintiff to plaintiff's alleged irreparable injury. The complaint asked for a temporary and permanent injunction and damages. Defendants filed a motion to dismiss, the basis of which was that, although the complaint disclosed the existence of a labor dispute within the meaning of that term as contained in the Norris-LaGuardia Act, 29 U. S. C. A. 101, et seq., the plaintiff had failed to verify the complaint under oath and to make the necessary allegations required under the provisions of that Act.

The motion for temporary injunction and motion to dismiss were jointly submitted to Judge Goldsborough on September 5, 1945. After hearing extended arguments, the Court, on September 7, 1945, entered orders overruling the motion to dismiss and granting plaintiff's application for an injunction pending trial. The complaint was not under oath, and the Court did not hear the testimony of any witness under oath; neither did the Court make any findings of fact or enter any formal opinion in the matter.

Issues Involved

There are two issues in this case. The first issue is whether the complaint reveals the existence of a labor dispute between the plaintiff and the defendants as the term is defined in the Norris-LaGuardia Act so as to make that Act applicable. If there does exist such labor dispute, then the Court was clearly in error in overruling defendants' motion to dismiss, because the complaint failed to contain various allegations required under Sections 7 and 8 of the Norris-LaGuardia Act, which is a condition precedent to jurisdiction of the Court to issue an injunction, and it was not verified as also required under Section 7, and the Court was further in error in issuing the injunction without taking testimony under oath, as is likewise required under Section 7, and without making findings of fact as is required under Section 9.

The second issue is whether, irrespective of the applicability of the Norris-LaGuardia Act, the injunction in question, which broadly restrains peaceful picketing and other forms of communication by defendants, is invalid as constituting an interference with defendants' freedom of speech protected under the First Amendment.

Pertinent Portions of Statute Involved

Various provisions of the Norris-LaGuardia Act are relevant to a determination of the issues herein. On the question of whether plaintiff failed to make certain necessary allegations, and whether the Court failed to observe various procedural requirements in issuing the temporary injunction, the following sections of the Act are applicable:

“Section 7. No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title,

except after hearing the testimony of witnesses in open court (with opportunity for cross - examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

“Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable,

such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. Mar. 23, 1932, c. 90, Sec. 7, 47 Stat. 71."

"Section 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, Sec. 8, 47 Stat. 72."

"Section 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly

included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

On the question of whether a labor dispute exists, making the Norris-LaGuardia Act applicable, the following section is relevant:

"Section 13. When used in sections 1-15 of this title and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of

persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73."

Argument

I

The general principles applicable to a determination of whether a particular dispute constitutes a labor dispute within the meaning of the term as used in the Norris-LaGuardia Act and the application of such Act in such instances have been thoroughly considered and discussed by this Court in the cases of *Fur Workers Union Local No. 72 v. Fur Workers Union Local No. 21238*, 105 Fed. (2d) 1, and *Green v. Obergfell*, 121 Fed. (2d) 46. This Court is respectfully referred to such decisions for such general principles. The two cases are decisive of the first issue in this case.

Since injunctive relief in the present case is being sought against defendant union, Bakery Sales Drivers Local Union No. 33, its members and officers, and since such labor organization and its members have a direct, and certainly an indirect, interest in the trade carried on by plaintiff, namely, the selling of bakery goods delivered by members or potential members of defendant's organization, it is clear that such defendants are participating or interested in a "labor dispute" as the term is used in Section 13(b) of the Norris-LaGuardia Act. Further, it is clear that the present case involves persons either engaged in the same industry or trade, or having a direct or indirect interest therein, and that the dispute is between an employer and an association of employees, or involves conflicting or competing interests, under the definitions contained in Section 13(a) above quoted.

The parties to the present case being those commonly contemplated as coming under the provisions of the Norris-LaGuardia Act, the remaining question is whether the complaint reveals that such parties are engaged in a labor dispute as defined in Section 13 of the Norris-LaGuardia Act—a question which must be determined from the allegations contained in the complaint. Defendants submit that the complaint reveals not one but three labor disputes existing between defendants and plaintiff, any one of which is sufficient to bring the present proceedings within the provisions of the Norris-LaGuardia Act.

Paragraph 3 of the complaint reveals a dispute between plaintiff and a member of defendant union, engaged in delivering bakery products baked by the Hinkle Bakery to plaintiff, concerning the hour of the day in which deliveries were to be made, plaintiff requesting that the delivery be made at some hour other than during the noon lunch period, and defendant's member insisting that he could deliver only at noon. The complaint states in this respect as follows:

“3. The defendant number one is an un-incorporated association, commonly called a ‘labor union’ composed of many members who are mostly bakery drivers. About 2 months prior to wit, July 5, 1945, one of said member drivers of said defendant union, started to deliver bakery products for Hinkle's baker, which plaintiff has dealt with for several years. Due to the repeated deliveries of said bakery products to plaintiff during the busy noon hour, he was on to wit, the day aforesaid, required to bring said products, bread, etc., back at a later hour. Shortly thereafter, the said Hinkle bakery, informed plaintiff that the said driver would make no more deliveries to plaintiff and therefore the bakery could make and furnish plaintiff with no bakery products. Plaintiff did immediately thereupon arrange with another bakery to secure its bakery

products, the same which were delivered to the plaintiff."

Paragraph 4 of the complaint reveals the existence of two other labor disputes between defendants and plaintiff. The one dispute concerns the collection of a certain sum of money claimed to be owed by plaintiff to a member of defendant union as compensation for delivering bakery products, and the other dispute concerns the sale by plaintiff of a non-union made commodity. Paragraph 4 states as follows:

"On to wit, July 26, 1945, one Charles M. Andre, the other defendant herein, came in plaintiff's said place of business, and after stating that he was the agent of defendant union, and that a certain sum, about \$150.00 was owing to the driver by plaintiff, and that it had to be paid immediately. The plaintiff informed the said agent that no dealings were had with the driver of Hinkle's bakery, that the account had always been with the bakery, and that payment was at all time made direct to the bakery by check, and never to the driver; that whatever was due Hinkle's bakery would be paid in the regular course and upon adjustment made. Defendant Andre stated he was not concerned in any adjustments or account, that payment would have to be made to the driver in full, and further that unless plaintiff immediately discarded and discontinued carrying for sale a certain non-union made item, of the many hundreds of foods, carried by plaintiff aforesaid, his union would stop and prevent any more bread and bakery products, also all dairy products, also all shipments from outside of the District of Columbia made by Railway Express Co., from being delivered to the plaintiff; that his union was formed and maintained to enforce its demands and were able to do so."

The complaint then goes on to allege that, because of plaintiff's refusal to accede to defendants' request in respect to the above matters in dispute, defendants peacefully

picketed and boycotted plaintiff's place of business and prevented the delivery of bakery products to plaintiff.

It is submitted that the pleadings clearly indicate the existence of several labor disputes between plaintiff and defendants, any one of which comes within the meaning of the term "labor disputes" as used in the Norris-LaGuardia Act, and thus the present proceedings for injunction are brought within the limitations of the Norris-LaGuardia Act.

Whether the member of defendant labor union, providing a service for plaintiff by delivering bakery products to him, was in the strict relationship of an employee of plaintiff is immaterial to the determination of whether a labor dispute exists. Subsection (c) of Section 13 specifically states that the disputants need not stand in the proximate relationship of employer and employee, and many decisions have held that the absence of the legal relationship is not a determining factor. See, in particular, *Lauf v. Shinner*, 303 U. S. 323, and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552. In truth, the Norris-LaGuardia Act was passed to overcome the decision in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, which confined the dispute to the proximate relationship of employer and his employees only. Neither, of course, is the merit or lack of merit, the wisdom or lack of wisdom, of the particular demand a matter for court determination. *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U. S. 91; *United States v. Hutcheson*, 312 U. S. 219. Nor is the Norris-LaGuardia Act concerned with the background or the motives of the dispute or of whether the dispute falls within the classic or traditional demand for increased wages or shortened hours. Any dispute touching upon or affecting employment or the method of its performance, or the means or manner of gaining a livelihood, is within the contemplation of the term 'labor dispute' under the Norris-

LaGuardia Act as an enactment designed to extend and amplify the prohibitions of the Clayton Act respecting the issuance by Federal Courts of injunctions against labor organizations. *New Negro Alliance v. Sanitary Grocery Co., supra*; *Green v. Obergfell, supra*. Even though the consequence of application of the Norris-LaGuardia Act is hardship, it is the duty of the courts to apply the Act as it stands. *Fur Workers Union, Local No. 72, v. Fur Workers Union Local No. 21238, supra*.

The dispute set forth in the complaint between plaintiff, the recipient of the deliveryman's service, and the deliveryman who is a member of defendant union as to the particular hour in the day during which such member is to deliver bakery products to plaintiff bears a direct relationship to the conditions of such member's employment. Obviously, every customer in the city could not be supplied at one particular time of the day, and deliveries must be spaced. The said member's working conditions might very possibly have been adversely affected by a required change in hours of delivery as demanded by plaintiff; had oral testimony been obtained, as contemplated by the statute, it would have been revealed that such member had to make his deliveries at that time and that O.P.A. regulations prohibited more than one delivery a day.

Similarly with a request by such member and his organization that he be paid directly by plaintiff for services rendered in delivering bakery products. Certainly, if it is a labor dispute to ask that wages be increased, or that wages not be cut, it is equally a labor dispute to ask that wages or compensation for services rendered be paid. When the member's refusal to acquiesce in plaintiff's demand for a changed delivery schedule resulted in plaintiff's ceasing to utilize such member's services, such member simply requested that he be paid for services theretofore rendered, and upon refusal invoked the aid of the organization which

he had joined for the specific purpose of obtaining protection and assistance in respect to compensation for his daily labor. The fact that plaintiff desired to make payments to an intermediary, and that the member desired to dispense with the intermediary, is immaterial. The fact is that the member has requested payment for services rendered and insists that plaintiff properly owes him for such services rendered, and the plaintiff's failure to pay results in a labor dispute just as surely as if an employer had locked out his employees, refusing to pay them their wages when he did so. Again, were oral testimony permitted, as contemplated under the Act, it would have been shown that it is the universal practice and custom in the District of Columbia for bakery drivers to be paid directly by the customer, but that by arrangement between the driver and the plaintiff, remittance was made to Hinkle's bakery for and on behalf of the driver as a convenience to plaintiff. Testimony would have disclosed the true situation—which is that the driver is responsible for the commodity delivered, and the money to be paid by plaintiff includes the wages and commissions due the driver for the services performed by him, and that such arrangement is operative in this class of employment in the District and has been so for many years, and that plaintiff knew of it and agreed thereto. It would further have been shown that even the amount tendered by the plaintiff to the bakery was insufficient, and the check transmitted being marked "Paid in full" was unacceptable and for that reason refused.

Finally and most conclusively, the complaint alleges the existence of a dispute concerning the sale by plaintiff of a "certain" non-union made product. Certainly, no more traditional dispute exists than that between labor organizations and persons who assist in the process of impairing or threatening union-established working conditions by

dealing with employers manufacturing or delivering products with non-union help and under non-union conditions.¹ See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, wherein the Court said:

“* * * in order to render a labor combination effective it must eliminate the competition from non-union made goods, * * *,”

Indeed, the Norris-LaGuardia Act was specifically enacted to cure the effect of such decisions as that of the Supreme Court in *New Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37, in which case a refusal to work on or in connection with non-union products was held to be an unlawful strike under the Sherman Act. See *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, *supra*, and *New Negro Alliance v. Sanitary Grocery Co.*, *supra*.

¹ At the time of oral argument the Court conceded that this allegation in the complaint did allege a “labor dispute”. But plaintiff had filed an affidavit in which it was alleged that plaintiff had discontinued the sale of the non-union product. On the basis of the affidavit, the District Court concluded that the labor dispute in connection with the sale by plaintiff of non-union goods had terminated. This overlooks the fact that the allegations of the complaint must determine whether a labor dispute does or does not exist, and if the complaint does reveal the existence of a labor dispute, then it is *mandatory* upon the Court, under Section 7 of the Norris-LaGuardia Act, to take oral testimony under oath and make findings of fact prior to the issuance of any restraining order or injunction. If oral testimony had revealed the fact that a labor dispute had ceased to exist (a fact which defendants deny), then the Court might properly have disregarded that fact. To do this, however, merely on the basis of affidavits is to countenance the very practice which gave rise to the Norris-LaGuardia Act. Most certainly, the complaint must in the first instance be looked to to determine whether a labor dispute exists, and thus whether the Norris-LaGuardia Act is applicable, and thereafter the Court can take testimony to establish the facts and must afford defendants opportunity for cross-examination which is specifically required by the Act. Any other rule would destroy the safeguards against the issuing of injunctions against workers and their organizations solely on the basis of affidavits which it was the purpose of the Norris-LaGuardia Act to prevent.

In addition to the *Lake Valley Farm Products* and the *New Negro Alliance* cases, this Court is respectfully referred to the decision of the New York Court of Appeals in *Goldfinger v. Feintuch*, 11 N. E. (2d) 910, 276 N. Y. 281. In that case the Court held that the attempt of a labor organization to picket a retail store for selling non-union products involved a labor dispute within the meaning of a definition in the New York law exactly similar to the definition in the Federal law, and the Court further held that a labor union could request the public to refrain from buying a product made by non-union labor by peacefully picketing a store which sold the product, although the store was operated solely by the owner and employed no one that could have struck or picketed because of such sale. In addition on this point see *United States v. Hutcheson*, *supra*; *Denver Local Union No. 13 v. Perry Truck Lines*, 101 Pac. (2d) 436; *Stoner v. Robert*, 34 Wash. Law Reports 437; *Smythe Neon Sign Co. v. Local Union No. 405*, 284 N. W. 126; all of which involved comparable or similar circumstances. See also the opinion of Judge Morris in the *Consolidated Terminal Ice* cases before the District Court of the United States for the District of Columbia, Civil Action No. 5988 and Civil Action No. 5751 (special appeal dismissed by stipulation), wherein Judge Morris ruled that picketing by a truck drivers' union of a restaurant to protest the purchase and use by such restaurant of non-union ice involved a labor dispute within the meaning of the Norris-LaGuardia Act. See also *Krieger v. Bakery Salesmen Local Union No. 33*, Civil Action No. 21086, District Court of the United States for the District of Columbia, in which Judge Bailey sustained, on the basis of the Norris-LaGuardia Act, a motion to dismiss a complaint against the present defendant union, which alleged that such defendant was picketing plaintiff distributor of bakery products and such plaintiff's customers because such plaintiff distributed certain non-union bakery products.

The cases clearly establish that the controversy between plaintiff and defendants set forth in the complaint constitute a labor dispute under the Norris-LaGuardia Act. Since plaintiff in the present case has failed to file a complaint "*under oath*" and failed to allege inability or unwillingness of police officers to protect its property, and has failed to allege every reasonable effort has been made to settle such dispute either by means of conciliation or the aid of any governmental machinery, the complaint is insufficient and defendants' motion to dismiss should have been granted. *Grace Co. v. Williams*, 96 Fed. (2d) 478; *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 99 Fed. (2d) 309; *Dean v. Mayo*, 8 Fed. Supp. 73. Since the Court neither heard any oral testimony nor made any factual findings, the issuance of an injunction was improper. *Lauf v. Shinner, supra*; *Green v. Obergfell, supra* (decided by this Court and certiorari denied).

II

Irrespective of whether the Norris-LaGuardia Act is applicable, or whether it be considered that a labor dispute is involved, the injunctive decree herein deprives defendants of freedom of speech contrary to the provisions of the First Amendment to the United States Constitution and must be either vacated or modified. The injunction issued by Judge Goldsborough is extremely broad—indeed, it is strongly reminiscent of the type of decree issued against labor organizations in the notorious era of "government by injunction." In fact, a close check reveals that it is a copy of the much condemned injunctions in *Duplex v. Deering, supra*, and *New Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, supra*. It prohibits every form of peaceful picketing and peaceful communication of the facts of a labor dispute to third parties,

and goes so far as to require defendants to perform delivery service for plaintiff under any and all circumstances. It borders on imposition of involuntary servitude. (See Justice Brandeis' dissent in the *Bedford Cut Stone Co.* case, *supra.*) In the following quotation from the decree, the more striking features have been underscored.

“Ordered: that the defendants, Bakery Sales Drivers Local Union No. 33 and Charles M. Andre, and each of their officers, members, agents, servants, confederates, and associates, howsoever, and all persons acting in aid of, or in conjunction with them or any of them be, and they hereby are, restrained and enjoined until the final decree in herein action, from conspiring, agreeing or combining in any manner to *restrain, obstruct or destroy the business of the complainant, or to prevent the complainant from carrying on the same without interference from them or any of them*, and from threatening, intimidating, requiring or in any manner preventing any and all bakeries wheresoever located from selling, delivering and serving their products to complainant, and any and all other suppliers of merchandise or service, who do or may sell, deliver or serve complainant with any merchandise or service of any kind whatsoever, and from picketing complainant's place of business, and from uttering, or in any manner publishing of complainant anything whereby complainant's credit can or may be impaired, and from conducting any boycott whatever against complainant or in connection with the conduct of her business, and from in any manner *whatsoever impeding, obstructing, interfering, with or restraining the complainant's business*, and from soliciting, directing, aiding, assisting, or abetting any person or persons, company or corporation to do or cause to be done any of the acts or things aforesaid.”
(Emphasis supplied.)

It is clear that a proscription as sweeping as that set forth above restrains members of defendant organization

in the exercise of the right peacefully to picket plaintiff's premises, to communicate the facts of their dispute with plaintiff to third parties and to request such third parties not to trade with plaintiff, and to refuse to lend their services or labor in the delivery of bakery products to plaintiff. It is to be noted that the injunctive decree against defendants and their members does not relate to any specific demand or controversy and is not concerned with the nature of the dispute with the employer or the peaceful character of defendants' activities. Any and all protest concerning present and future conduct on the part of plaintiff which may be, or be deemed, detrimental or contrary to the interests of defendant's members is prohibited. The proscription is much broader than that involved in *Thornhill v. Alabama*, 310 U. S. 88, where the United States Supreme Court upheld the right of peaceful picketing as a concomitant of free speech protected against Federal and State encroachment by the First Amendment. What was declared by the Court in the *Thornhill* case in commenting upon the illegal scope of the proscription against picketing involved in the case is applicable here:

"In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute."

Clearly, the injunctive decree in the present case must be vacated if the following language by the Supreme Court in the *Thornhill* case is to be given any effect:

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

* * * It is recognized now that satisfactory hours

and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."

* * * * *

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries v. Tri-City Council*, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

In *Bakery and Pastry Drivers and Helpers Local 802 v. Hyman Wohl*, 315 U. S. 769, the United States Supreme Court considered a situation closely analogous to the present one. There a bakery drivers' union, in attempting to combat a so-called vendor system of bakery deliveries, were engaged in picketing the places of business of manufacturing bakers who sold to vendors and also the places

of business of the customers of the vendors purchasing the bakery products from such vendors or obtaining deliveries of bakery products from such vendors. A New York Court issued an injunction against such picketing, which injunction was affirmed by the New York Court of Appeals, that Court holding that no labor dispute was involved within the meaning of the New York statutes. The United States Supreme Court reversed the New York Court of Appeals, holding that, irrespective of whether a labor dispute could or could not be said to exist, the New York Court had no power to broadly restrain members of a labor organization from expressing their grievances in a labor matter. The Court stated as follows:

“So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow; one need not be in a ‘labor dispute’ as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.”

* * * * *

“We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or

threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue."

In *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, Sup. Ct. Adv. Sheets Vol. 89, No. 17, p. 1441, the Supreme Court, in upholding the determination of a District Court that a labor organization, by combining with an employer, had engaged in violations of the Sherman Anti-Trust Act, nevertheless required that the broad injunctive decree issued by the District Court be modified so as to separate the licit from the illicit. The Supreme Court said:

"This brings us to a consideration of the scope of the declaratory judgment and the injunction granted by the district court. We cannot sustain the judgment or the injunction in the form in which they were entered."

* * * * *

"And when we turn to the sweeping commands of the injunction, we find that its terms, directed against the union, and its agents alone, restrained the union, even though not acting in concert with the manufacturers, from doing the very things that the Clayton Act specifically permits unions to do. We agree with the following statement of the Circuit Court of Appeals:

'Indeed, the injunction is so far contrary to the statute that its mandates might well have been

stated in the converse of the terms of the Clayton Act, Section 20, viz., as restraining Local 3 and its officers "from terminating any relation of employment, or from ceasing to perform any work or labor * * * or from ceasing to patronize * * * any party to such dispute, or from recommending, advising, or persuading others, by peaceful and lawful means so to do." 29 U. S. C. A. Section 52, supra.' "

Similarly, in *Florsheim Shoe Store Co., Inc. v. Retail Shoe Salesmen's Union*, 16 L. R. R. 345, the New York Supreme Court, Appellate Division, modified a judgment granting permanent injunction, on employer's petition, restraining minority union from acting to injure employer's business or customers or from interfering with employer's performance of closed-shop contact with union certified by New York State Labor Relations Board to avoid conflict with rights guaranteed by Federal Constitution by striking out portions of order prohibiting union from interfering with employer's performance of contract with rival union, from calling or announcing existence of strike, from interfering generally with employer and its employees, and from picketing and boycotting employer.

Conclusion

For the foregoing reasons, it is respectfully submitted that the District Court clearly erred in refusing to dismiss plaintiff's complaint and in issuing the injunction against defendants.

WHEREFORE, petitioners pray that this Honorable Court enter an order allowing a special appeal from the orders entered in the District Court in Civil Action No. 30226, and that the Court *simultaneously reverse the orders com-*

plained of, with instructions to the District Court to dismiss the complaint.²

Respectfully submitted,

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
JACQUELINE WEMPLE,
736 Bowen Building,
Washington 5, D. C.,
Counsel for Petitioners.

² Respecting the Court's authority to grant petitioners' motion to reverse, see *American Manufacturing Co., petitioner, v. N. L. R. B.*, 309 U. S. 629; *N. L. R. B., petitioner, v. Foote Brothers Gear & Machine Corp.*, 311 U. S. 620; *Brotherhood of Railway Clerks, etc. v. United Transportation Service Employees of America, etc.*, 64 S. Ct. 260.

EXHIBIT A**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

C. A. No. 30226

A. WAGSHAL, Trading as, "Wagshal's Delicatessen", 4855
Massachusetts Ave., N. W., *Plaintiff*,

vs.

BAKERY SALES DRIVERS LOCAL UNION No. 33, an Unincorporated Association, and CHARLES M. ANDRE, Individually,
720-5th St., N. W., *Defendants*

Complaint for Injunction and Damages

The complaint of the plaintiff respectfully represents:

1. That she is a citizen of the United States and a resident of the District of Columbia and has been such for many years; that she now is and for many years has been, the owner of the business above named; that said business, conducted through her manager and employees in a store at 4855 Massachusetts Avenue, Northwest, in the District of Columbia, consists of dealing in and supplying at retail, hundreds of various kinds of plain and fancy foods and delicacies for human consumption, most of which are prepared, packed and canned by various manufacturers located in the several States in the United States and abroad. Food is also prepared and served in said store of plaintiff to many patrons, many of whom are in the Naval and Military services of the United States; that among other kinds of said foods, plaintiff sells and serves large quantities of bread, rolls, pastries, and other bakery products, the same which are absolutely essential to the conduct of plaintiff's said business.

2. To offer larger and better facilities to the public, plaintiff has, shortly prior to the matters, hereinafter set forth occurring, expended about \$10,000. for modernized equip-

ment and alterations. Plaintiff's sale of said merchandise and serving of food aforesaid, totals about \$100,000. per annum.

3. The defendant number one is an un-incorporated association, commonly called a "labor union" composed of many members who are mostly bakery drivers. About 2 months prior to to wit, July 5, 1945, one of said member drivers of said defendant union, started to deliver bakery products for Hinkle's bakery, which plaintiff has dealt with for several years. Due to the repeated deliveries of said bakery products to plaintiff during the busy noon hour, he was on to wit, the day aforesaid, required to bring said products, bread, etc., back at a later hour. Shortly thereafter, the said Hinkle bakery, informed plaintiff that the said driver would make no more deliveries to plaintiff and therefore the bakery could make and furnish plaintiff with no bakery products. Plaintiff did immediately thereupon arrange with another bakery to secure its bakery products, the same which were delivered to the plaintiff.

4. On to wit, July 26, 1945, one Charles M. Andre, the other defendant herein, came in plaintiff's said place of business, and after stating that he was the agent of defendant union, and that a certain sum, about \$150.00 was owing to the driver by plaintiff, and that it had to be paid immediately. The plaintiff informed the said agent that no dealings were had with the driver of Hinkle's bakery, that the account had always been with the bakery, and that payment was at all time made direct to the bakery by check, and never to the driver; that whatever was due Hinkle's bakery would be paid in the regular course and upon adjustment made. Defendant Andre stated he was not concerned in any adjustments or account, that payment would have to be made to the driver in full, and further that unless plaintiff immediately discarded and discontinued carrying for sale a certain non-union made item, of the many hundreds of foods, carried by plaintiff aforesaid, his union would stop and prevent any more bread and bakery products, also all dairy products, also all shipments from outside of the District of Columbia made by Railway Express Co., from being

delivered to the plaintiff; that his union was formed and maintained to enforce its demands and were able to do so. Shortly thereafter payment of the balance due by plaintiff to Hinkle's bakery was made direct to said bakery minus certain credits, said payment was thereafter returned by defendant union with a letter signed by defendant Andre as president, setting forth that the payment, "which is owned to our member, Leon Wolfe, cannot be accepted.

5. On the following day, July 27, 1945, The New Philadelphia bakery, which had been delivering its products to plaintiff informed her that no more deliveries could be made; that the defendant union had advised them that if any more bakery was sold or delivered to plaintiff, it would "pull out all its drivers". Plaintiff did thereafter attempt to secure bread, etc., from other bakeries, but defendants, well knowing that plaintiff's continuation in business was largely based upon its being able to sell and to serve bread, and other bakery products, and conspiring and contriving to injure and to destroy plaintiff's said business, caused, by means of threats and intimidations to destroy the business of the several bakeries, the said various bakeries were thus forced to breach their contracts of sale of bread, etc., made with the plaintiff. Plaintiff has by the means aforesaid been boycotted, as was threatened to by said defendants, with all bakeries in said District, resulting in plaintiff being unable even to call at the premises of the bakeries and thereby obtain said bread, etc., for cash. Defendants have also threatened to prohibit in like manner all deliveries and sales of milk and dairy products to be made to the plaintiff, which if not enjoined, will compell plaintiff to discontinue business, to her irreparable damage. Plaintiff through her agents have attempted to secure bread at retail from other retail stores, but this method, too, defendants are preventing by having threatened a certain grocery store to cut off their supply of breads, etc., if as much as one loaf of bread was sold to said plaintiff's agent. Defendants have falsely and maliciously stated of plaintiff, in furtherance of its boycott of plaintiff and practice of extortion and coercion, to several of said bakeries, as reason why they must not furnish its products to plaintiff, "that plaintiff was involved in a labor

dispute, the same which is false and known to be false by the defendants.

6. Plaintiff had prior to the happenings herein set forth, had and enjoyed a good reputation for honesty and fair dealing, and thereby had a good credit standing among the trade; that defendants, well knowing the same, and maliciously intending and conspiring to injure plaintiff in her good credit standing aforesaid, the same which is valuable to her business, the defendant, Charles M. Andre individually and as agent for defendant union, stated and published the false and malicious statement, that plaintiff owed money to one of its member drivers and would not pay him. All of which has caused plaintiff great damage in her business and in suffering great nervous shock and mental anguish.

7. Defendant Andre did personally stand outside of plaintiff's place of business for two days and picketed the plaintiff.

8. That said picketing and boycotting is continuing by defendants which is seriously affecting plaintiff's business, she is unable to get the kind or quantity of bread-stuffs needed, and if defendants carry out their threat to prevent plaintiff from securing dairy products, she will be compelled to discontinue business.

Wherefore, the premises considered, complainant prays:

1. That defendants be restrained, pendente-lite and permanently from boycotting and in any manner interfering with plaintiff's business and cease all and all acts herein set forth tending to prevent plaintiff from securing any merchandise from any and all dealers or manufacturers.

2. That defendants and each of them and their members, associates who-soever, be restrained and enjoined from uttering or in any manner publishing and false and slanderous statements about the plaintiff and in the conduct of her business, and of any of her employees or associates.

3. That defendants be required to pay plaintiff the sum of \$50,000 as actual damages and the further sum of \$50,000 as punitive damages.

4. And for any other relief to which the plaintiff may be entitled.

PHILIP WAGSHAL,
Attorney for Plaintiff.
Bond Building,
District 3035

(465)

No. 9121

BRIEF FOR THE APPELLEE

United States Court of Appeals

DISTRICT OF COLUMBIA

BAKERY SALES DRIVERS LOCAL UNION No. 33,
an Unincorporated Association, and
CHARLES M. ANDRE,

Appellants,

VS.

A. WAGSHAL, Trading as "WAGSHAL'S DELICATESSEN",
Appellee.

Appeal from the District Court of the United States
for the District of Columbia

*United States Court of Appeals
for the District of Columbia*

PHILIP WAGSHAL,
Bond Building,
Washington, D. C.,

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
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Washington, D. C.,

Counsel for Appellee.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9121

BAKERY SALES DRIVERS LOCAL UNION No. 33,
an Unincorporated Association, and
CHARLES M. ANDRE,

Appellants,

vs.

A. WAGSHAL, Trading as "WAGSHAL'S DELICATESSEN",
Appellee.

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This is an appeal from Interlocutory Orders (R. 27, 28) of the Court Below (Justice T. Alan Goldsborough) entered on September 7, 1945, in favor of the appellee, A. Wagshal, trading as "Wagshal's Delicatessen", restraining the appellants from acts designed to destroy appellee's business and overruling Appellants' Motion to Dismiss the Complaint.¹

¹ The Record references herein are to the original Record as transmitted to this Court by the District Court. The only portion of the Record printed by appellants is the Complaint which is found at page 23-27 of appellants' brief. After this Court denied an application for Special Appeal, the appellants were granted leave to proceed on their brief filed as a Petition for Allowance for Special Appeal but additional portions of the Record were not designated for printing.

Appellee filed a Motion on April 3, 1946, to dismiss the appeal for the reason that the Orders of the Court below were not final and, therefore, not appealable. This Court on May 13, 1946, indicated its desire to hear argument on the question whether the cause involved a "labor dispute" within the meaning of the Norris-LaGuardia Act (29 U.S.C.A. 104, 107, 113) and ordered the cause placed on the Summary Docket for argument on that single question.

STATEMENT OF THE CASE

The present case arose on Appellee's Complaint for injunction and damages, Motion for Preliminary Injunction (R. 5), Appellants' Motion to Dismiss (R. 9, 10), the Answer of Appellee to the Motion to Dismiss, and the supporting affidavits of Benjamin Wagshal (R. 14, 20, 24), Milton Blum (R. 21), Jacob C. Leaman (R. 22), Leon Terish (R. 23), Bernard H. Patton (R. 25) and Leo H. Freiburger (R. 26).

The appellants having filed a Motion to Dismiss and adopted the sole and exclusive position in the Court below that the cause involved a "labor dispute", *the following facts were admitted to be true:*

The plaintiff has been for many years the owner of a delicatessen business located at 4855 Massachusetts Avenue, Northwest, Washington, District of Columbia. She sells at retail hundreds of kinds of foods, most of which are prepared and packaged by manufacturers throughout the United States and abroad. Among the foods sold are large quantities of bread, rolls, pastries and other bakery products "which are absolutely essential to the conduct of plaintiff's business." Shortly before filing the complaint in the Court Below, she had spent about \$10,000 for modernization, equipment and alterations in her store.

The gross sales derived from the business totaled about \$100,000 a year. (R. 1)

On, to wit, May 5, 1945, a bakery truck driver, member of appellant Union, commenced delivering bakery products for Hinkle's Bakery. Appellee had been doing business with Hinkle's Bakery for several years prior thereto. On several occasions prior to July 5 1945, the aforesaid bakery truck driver had delivered bakery products to appellee during the busy noon hour and, accordingly, on July 5, 1945, appellee required the said driver to bring said products back at a later hour. (R. 2) Shortly thereafter, Hinkle's Bakery advised appellee that the said driver would make no further deliveries to appellee and that, therefore, Hinkle's bakery would not furnish appellee with any more bakery products. Thereupon, appellee arranged with another bakery (New Philadelphia) to secure bakery products and deliveries were made.

On July 26, 1945, the appellant, Charles M. Andre, appeared at appellee's place of business, identified himself as the agent of appellant Union, and stated that \$150 was owing to the bakery truck driver aforesaid by appellee. He demanded immediate payment. Appellee stated that she had had no dealings with the driver and that the account was with Hinkle's Bakery; that previous payments had always been made directly to the Bakery by check and never to the driver; that Hinkle's would be paid in due course. Appellant, Andre, stated that payment would have to be made directly to the driver in full, and, further, that unless appellee immediately discontinued selling a certain non-union made item, appellant Union would forthwith stop deliveries to appellee of bread, bakery and dairy products, and other shipments from without the District of Columbia made by Railway Express. Andre stated that his Union was formed and maintained to enforce its demands and were able to do so. Shortly thereafter payment of the account was made by appellee, as in the past,

to Hinkle's Bakery, less certain credits. The said payment was returned *by appellant Union*, with a letter signed by Andre, as president, stating that the payment "which is owed to our member, Leon Wolfe, cannot be accepted." (R. 2)

On July 27, 1945, the New Philadelphia Bakery which had been delivering products to appellee, sent word that no more deliveries could be made; that appellant Union had threatened to "pull out all its drivers if any products were sold or delivered to appellee." Thereupon, appellee attempted to secure products from other bakeries and appellant Union threatened similar reprisals if products were sold or delivered to appellee. A boycott was accordingly laid against appellee. Appellee was not able to buy bread from bakeries. Appellant Union also threatened to prohibit all deliveries and sales of milk and other dairy products. Appellee was not able to purchase bread at retail, retail stores having been threatened with reprisals if sales were made to appellee. Appellant union announced to various bakeries that "plaintiff was involved in a labor dispute," which statement was alleged to be false.

Appellee had, prior to the incidents herein recited, enjoyed a good reputation in the trade, yet appellant Andre published false and malicious statements that plaintiff owed money to the Hinkle Bakery truck driver aforesaid and would not pay him. (R. 3)

Appellant Andre personally stood outside of appellee's place of business and picketed the delicatessen. The picketing and boycotting herein described *continued* and as a result appellee was unable to secure necessary food products, all of which illegal conduct would ultimately destroy appellee's business.

Accordingly, the Court below was asked to restrain pendente lite and permanently the defendants from boycotting and interfering with the business of appellee, and,

further, restrain the defendants from publishing false statements with respect to appellee's business. In addition to the injunctive relief, appellee claimed actual damages in the amount of \$50,000 and an equal amount as punitive damages. (R. 4)

We also set forth herewith a digest of the uncontroverted affidavits filed in support of the application for interlocutory relief:

Benjamin Wagshal

This affiant stated that the delicatessen had been operating for approximately nine years and in its present location approximately seven years; that he is the manager thereof; that it is a general delicatessen business and restaurant; that the business is retail in nature; that food is also served on the premises; that bread is an essential product in the conduct of the business; that business had been done with Hinkle's Bakery for approximately three years; that purchases of bread had been made directly from Hinkle's Bakery and payment therefor always made by check to Hinkle. (R. 14, 15) that at no time theretofore had any question ever been raised by the Union or any of its drivers in regard to the direct payment to Hinkle for products purchased; that no demand for payment had ever been made at any time by the Union or any driver thereof prior to the instant controversy; that no contractual relations with the Union, or any of its drivers, had ever existed; that contract obligations were incurred with Hinkle and with no one else; that this was well known to the Union and to the driver; that the driver, Wolfe, had been advised that noontime deliveries of bread were extremely inconvenient and, accordingly, was asked to deliver the bread at some other hour; that the driver then refused to deliver bread at all; that appellee was indebted

to Hinkle for bread already delivered "and in accordance with the said practice which had existed over the entire period of time during which plaintiff had been buying bread from this bakery made her check payable to the owner of said bakery in the amount which she considered to be in full for all indebtedness then existing;" that Andre came to the delicatessen and stated that there was owing to the driver, Wolfe, approximately twelve dollars (\$12.00) more than the amount forwarded to Hinkle by check; that by letter dated August 8, 1945, the check mailed to Hinkle was returned by Andre of the Union "because it is \$12.22 short of the amount which is owed to our member, Leon Wolf."

Affiant further stated that no bread had ever been purchased from Wolfe and that all bread was ordered directly from the Hinkle Bakery.

Affiant further stated that prior to receiving the said letter, Andre orally advised affiant that the full amount would have to be paid and while doing so "pointed to a few packages of rolls" and advised him that he must get rid of them; that these rolls constituted but a small item of plaintiff's merchandise and, in comparison with the total amount purchased and sold by plaintiff, constituted an insignificant amount. The affiant further stated that as to this statement with regard to these rolls, Andre was making of them but an occasion for enforcing payment to Wolfe, the driver, a member of the Union.

Affiant then stated that Wagshal's had discontinued handling said rolls even though the same brand of rolls were on sale in many establishments in the City of Washington; further, that no question had ever been raised by the Union or any member (including Wolfe) thereof at any time theretofore in regard to their sale on the premises of plaintiff, even though the said Union had been delivering bread to Wagshal's from Hinkle's Bakery over a long period of time. (R. 17)

Affiant further stated that the Union caused all deliveries of bread to be stopped and threatened bakeries and stores with reprisals if deliveries of any kind of merchandise were made to the appellee. (R. 18)

Affiant concluded by stating that Wagshal's was willing and able to pay any indebtedness owing to the owner of Hinkle's Bakery; that at no time had there ever been a dispute with Hinkle; and "that the defendant Union is now attempting by its conduct hereinbefore described to compel the payment of a small item of \$12.22 without determining the justice of the payment. . . ." (R. 19)

Milton Blum

He stated that he was a partner and co-owner of the New Philadelphia Bakery located at 218-9th Street, Southeast; that commencing about July 7, 1945, Wagshal ordered certain bakery products and deliveries were made; that payment therefor was made by check; that said deliveries averaged about 1,000 loaves of bread exclusive of rolls; that on July 25, 1945, Andre, agent of the Union, informed him that no further sales or deliveries of bakery products could be made to Wagshal for the reason that money was owed to a Union driver and that Wagshal refused to make payment. The affiant was told that unless sales to Wagshal were stopped, his bakery truck drivers would be "pulled out as the drivers refused to work for anyone who did not pay their bills." No further sales were made to Wagshal. (R. 21)

Jacob C. Leaman

This affiant was employed by the Atlantic and Pacific Store located at 4855 Massachusetts Avenue, Northwest, adjacent to Wagshal's Delicatessen. He stated that an agent of the Union told him that no bread of any kind was to be sold to Wagshal and that even if as much as one loaf of bread was sold, no more bread would be delivered to

said A. & P. Store. Accordingly, no further sales were made to Wagshal. (R. 22)

Leon Terish

This affiant stated that he operated a grocery store in Hyattsville, Maryland. He stated that he knew Benjamin Wagshal and, in order to assist him, had permitted purchases of bakery products to be made in his name; that an agent of the Union appeared at his store and told him that he was "not supposed to help Wagshal in any way to obtain bread, etc., from any of the bakeries and that we will have to watch you to make sure that you do not help Wagshal." (R. 23)

Benjamin Wagshal

This affiant filed a further supporting affidavit wherein he stated that every effort to secure bread was thwarted by the Union and that he was followed by an agent or agents of the Union in order to prevent him from obtaining bread and bakery products from any and all bakeries. (R. 24)

Bernard H. Patton

This affiant stated that he was the plant manager of Rice's Bakery. Although deliveries had been made over a long period of time to Wagshal, the driver for Rice's Bakery was directed by the Union to cease making deliveries to Wagshal "by reason of certain difficulties." The driver brought the bakery products back to Rice's. "Due to the said demand of said Union we have made no further deliveries to said store." (R. 25)

Leo H. Freiburger

This affiant stated that he was the owner of the Certified Bakery. He stated that he refused to sell or deliver bread

to Wagshal for the reason that a Union official had informed him that Wagshal's Delicatessen was cut off from service by all Union bread salesmen because of a bill due and unpaid owing to one of the members of the said Union. He also stated that selling bread to Wagshal at the bakery might be construed as a labor dispute and result in a work stoppage by the members of the Union at his bakery. "I therefor refused to sell the bread to Mr. Wagshal for the above mentioned reason. Furthermore, it is not the policy of this bakery to sell bread to anyone indebted to another bakery." (R. 26)

The Argument and the Ruling in the Court Below

The cause was in the above posture when it came on for hearing before the Court below on September 5, 1945. (R. 32) The Complaint, Motion for Preliminary Injunction and Supporting affidavits, were met by appellants' Motion to Dismiss which admitted the truth of these allegations. Under the Federal Rules of Civil Procedure, it is not necessary that a Complaint state ultimate facts (Rule 8A) although the present Complaint is very factual in content. It is sufficient if plaintiff's claim for relief is disclosed by any method, by facts or otherwise; and, it is the function of the trial court to determine the nature of the cause of action asserted in the light of the pleadings and reasonable inferences to be drawn therefrom.

This Court will note that appellants commenced the argument in the Court below and advanced grounds in support of the Motion to Dismiss. (R. 33-34) The assumption was immediately indulged that the cause involved a "labor dispute" and the contention was made that the proceeding did not comport with the requirements of Section 107, of the Norris-LaGuardia Act. (R. 33-35) The argument of the Union in support of the Motion to Dismiss may be summarized as follows:

1. The Complaint alleges that the plaintiff is engaged in selling and serving foodstuffs and was *serviced* by a Union bakery driver.

2. Plaintiff was dissatisfied with the hour of delivery of bread made by the Union bakery driver.

3. When the plaintiff disapproved the hour of delivery of bread, the bakery driver refused to make any further deliveries.

4. The bakery driver claims monies are owed to him by the plaintiff.

5. The business agent of the Union made demand on the plaintiff for monies allegedly owing to the bakery driver.

6. At the time the demand was made for money allegedly owing the driver, the appellant, Andre, noticed in the delicatessen that plaintiff was carrying a "non-union-made brand of bread" and notified plaintiff that he would have to cease selling this product (R. 36, 37)

To recapitulate, the Union maintained that the Complaint pleads a "labor dispute" involving conditions of employment, i.e., hours of delivery of bread; a dispute over monies owed; and, a dispute between the Union and plaintiff as to the sale of a non-union product.

Mr. Padway at one point announced that "the Union takes the position Wagshal owes this money to the Union driver and the driver takes that position. Wagshal takes the position if he owes anything at all, he owes it to Hinkle. That is the labor dispute." (R. 46)

Appellee announced at the commencement of her argument that reliance was being placed on the general equity jurisdiction of the Court and that no "labor dispute" within the meaning of the Norris-LaGuardia Act existed. After extended argument, the Court below ruled that a

controversy involving the collection of a bill did not involve a "labor dispute" and

"that this alleged non-union product was rolls which it immediately agreed to discontinue the sale of, and that being so the Court is perfectly clear that no labor dispute existed in this case and a preliminary injunction should be granted." (R. 90)

Prior to signing the Order in the cause, the Court advanced the cause for hearing and set the date, by mutual agreement of the parties, for October 22, 1945. At this time the Court stated:

"... I doubt very much ... whether because an individual, who happens to be a member of a Union, claims someone owes him money instead of bringing suit for what he claims, so the amount of the debt, if any, can be ascertained in the regular way, can put his union on the alleged debtor and attempt to coerce the debtor in the payment of the bill. If that is the law I do not know it. You may be right about it, but I should like to see some authority for such a proposition as that."

MR. PADWAY: "Well, I think there is authority for that."

* * * * *

THE COURT:

"I haven't any doubt at all insofar as the debt is concerned that you haven't any standing in Court. I would be shocked at any Court who took the contrary position."

"On the other situation (cessation of sale of non-union products) it may be cured by amendment to the Bill. . . . But it was very clear to the Court that the Union could not suffer any damage if they were restrained from activity until the case were tried where-as the plaintiff might suffer irreparable damage which could not be compensated for. I had all that in mind, of course, and it was those considerations that made me feel the fair thing to do was set the case

down for trial, so that the Union, if it was entitled to its position, could have opportunity to maintain it.”
(R. 102-103)

STATEMENT OF POINTS

- Point I.** The Cause involves nothing more or less than an Ordinary Debt Action normally justiciable in the Small Claims Branch of the Municipal Court.
- Point II.** Summary Analysis of Appellant's Brief Exhibits the Pretext of a "labor dispute."
- Point III.** There never was a DISPUTE about Any Subject other than the Collection of a Bill.
- Point IV.** The Complaint as filed by the Plaintiff and Construed by the Court Below did not disclose a "labor dispute."
- Point V.** There was no Need for Findings of Fact, the pleadings being uncontroverted.
- Point VI.** The Truck Driver was Rendering SERVICES to Hinkle, not to Wagshal.

CONCLUSION: The Appeal should be dismissed for the reasons assigned in the Motion to Dismiss still pending in this Court.

SUMMARY OF ARGUMENT

Wagshal operates a delicatessen. She bought bread for years from Hinkle's Bakery. In July, 1945, the Hinkle Bakery truck driver delivered bread ordered by Wagshal

from Hinkle during the noon-hour rush. Wagshal refused to take the delivery then and suggested that deliveries be made at a more convenient time. Hinkle telephoned Wagshal and said that the truck driver would not deliver bread to the delicatessen any more. Wagshal proceeded to get bread from another source. Sometime thereafter a union official called at the delicatessen and declared that Wagshal owed the truck driver about \$150.00 for previous deliveries. Wagshal denied he owed the truck driver any money but acknowledged owing money to the Bakery and stated that the bill would be paid in due course. The union official demanded that payment be made to the driver and added that "unless plaintiff immediately discarded and discontinued carrying for sale a certain non-union-made item . . . his union would stop" deliveries of all merchandise to the delicatessen. Wagshal paid Hinkle but the check was returned by letter *from the Union* stating that it was short \$12.22. Simultaneously the union picketted, boycotted, and proceeded to destroy Wagshal's business.

We maintain that the foregoing facts do not constitute a "labor dispute" between the union and Wagshal within the meaning of the Norris-LaGuardia Act and that the Court Below was right when it issued an interlocutory injunction and overruled appellants' Motion to Dismiss the Complaint.

ARGUMENT

Point I. The Cause Involves Nothing More or Less Than an Ordinary Debt Action Normally Justiciable in the Small Claims Court.

The only question before the Court is whether a controversy over the amount of an alleged debt constitutes a "labor dispute" within the meaning of the Norris-LaGuardia Act. Collaterally, there is involved the question

as to whether the identity of the true creditor in a sale of merchandise can become the subject matter of a "labor dispute." A careful reading of the Record and transcript of argument in the Court Below will disclose that any other controverted matters lurking in the pleadings and argument are just so much window dressing. No quarrel, controversy or dispute of any kind existed between the litigants until Andre maintained that Wagshal owed Wolfe, the truck driver, \$12.22. When Wagshal refused to pay that sum, then boycotting, picketting, slander, libel, conspiracy, threats, reprisals and all that is considered the normal incidence of a true "labor dispute" followed. A cause normally the subject of a claim in the Small Claims Branch of the Municipal Court became according to the Union, a "labor dispute" and the Court Below was without jurisdiction to stop any and all acts designed to compel Wagshal to pay the money to the truck driver. This, although Wagshal had never had any contractual dealings whatsoever at any time with the Union or any member thereof.

Point II. Summary Analysis of Appellants' Brief Exhibits the Pretext of a "Labor Dispute."

Appellants' brief is based entirely upon facts which do not appear in the pleadings either by direct averment or reasonable inference. In fact it proceeds upon presumption. Appellants had the choice of filing an Answer to the Complaint and disclosing in that Answer the facts upon which they now rely by way of argument to make out a "labor dispute". They chose, however, to file a Motion to Dismiss. This Motion admits every fact well pleaded and every reasonable inference from the facts well pleaded. None of the ultimate facts in the Complaint spells out a "labor dispute" within the meanings of the Norris-LaGuardia Act. Appellants' argument amounts to the

contention that every difference between labor and industry constitutes a "labor dispute". This is not and cannot be the law. If it were so then every specious or ill-tempered difference arising between a laborer and a businessman would constitute a "labor dispute" and give to the Union the right to exert all of its power, with no rights left in business to oppose it save and except under the conditions imposed by the Norris-LaGuardia Act. Appellants were likewise required to file an Answer to the Motion for preliminary injunction, with affidavits, setting up therein those facts which they assert make out the "labor dispute" they try to read into the Complaint *now* in order to save the Motion to Dismiss. This they cannot do.

No court will hold that mere identity of a dispute with a labor union is sufficient to oust the jurisdiction of a Federal District Court to grant an injunction where otherwise the facts warrant one and where no "labor dispute" within the meaning of the Norris-LaGuardia Act exists. In this case on the broadest theory conceivable the controversy involved the amount of a bill owed to a third party (Hinkle) and its attempted collection.

Surely a dispute about an amount owed for bread to a third party cannot constitute a "labor dispute" where no relationship of employer and employee exists and where the purchase was made from the employer of the driver. As to Appellee the driver was acting in the capacity of a bill collector. The seller of the bread may have been glad to have him do so. He would thereby make it possible to obtain the amount he contends was due through the force of all the union activities. He cannot oust the Court of jurisdiction to determine the facts in controversy or deprive the purchaser of his right to his day in court. The driver who has volunteered cannot invoke the rights of union labor in his capacity as a volunteer bill collector. The relationship between the Bakery and the driver which is set forth in Appellants' brief appears nowhere in the

Complaint. Assuming it to be true, the driver then becomes an independent vendor and is within the ruling in *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143.

Neither is the dispute about the hour of delivery specifically alleged with sufficient certainty to make out a "labor dispute"; it is merely averred as the occasion which caused the peevishness on the part of the driver. *The Union never did the acts with which it is charged because of this.* A casual complaint about the inconvenience of deliveries at a particular time cannot be exaggerated into a dispute about hours, conditions of employment, wages, etc., which constitute the essentials of a "labor dispute" within the Norris-LaGuardia Act. Counsel for Appellants receded from this position in his argument in the Court Below and also in his argument about collecting the bill.

Counsel then seized upon the allegation of "a certain non-union made item". The only aid Appellants can get from this contention is on the theory that there is a unity of interest in the product delivered with the product sold. Assuming that theory to be sound, however, it must appear on the face of the Complaint when met by a Motion to Dismiss that the "certain non-union made item" is one in which there exists that unity of interest. This does not appear in any averment in the Complaint. Had the Appellants answered and identified the item then there might have been created the foundation for a "labor dispute". Testimony might then have been taken to determine the *good faith* of appellants and further whether there ever was a "labor dispute" over a non-union product. Appellants did not do so and now are distorting and exaggerating the Complaint to make it appear to contain what should have been alleged in an answer. Appellants tried a short cut. They created a short circuit.

Point III. There Never was a Dispute About Any Subject Other Than the Collection of a Bill.

A union truck driver tells a delicatessen owner that he cannot deliver bread at hours convenient to the delicatessen owner. The delicatessen owner, accordingly, is told by the bakery owner that the truck driver will no longer deliver any bread to the aforesaid delicatessen. (There is no **dispute or controversy of any kind at this point.**) Shortly thereafter, a business agent of the Union called at the delicatessen and declared that the sum of \$150.00 was owing to the truck driver and that this sum had to be paid immediately. The delicatessen disavowed any debt owing to the driver, saying the money was owed to the bakery owner, and this is when the *dispute begins*. The business agent said that payment must be had directly to the driver and, furthermore, the delicatessen was selling a "certain non-union made item" and unless this ceased, the delicatessen would be blocked from receiving bread, as well as all other food products, from all sources. The delicatessen owner, several days thereafter, sends a check to the bakery owner for a given amount in full settlement of the outstanding amount. Sometime shortly thereafter the labor union, of which the bakery truck driver is a member, returned the check by letter to the delicatessen owner, saying that the check is \$12.12 less than what the bakery truck driver maintains the correct amount to be and that the money is owed to the bakery truck driver and not to the bakery owner. The said letter is set forth in the transcript of the argument in the Court Below.

The problem now is whether (a) the matter of who is entitled to the money, i.e., the bakery owner or the bakery truck driver constitutes a "labor dispute" and (b) whether the mechanics of collecting the debt per se constitute a "labor dispute."

Up to the time that the dispute arose as to who was the

creditor, there had been no controversy as to any product, but the Union, by way of lifting itself by its own boot straps and to justify the "collection of a debt" (?) and wreckage of a business, and the invoking of sanctions which it conceived to be proper, proceeded to seize on this makeweight. Is that a "labor dispute"? What has happened to candor in these United States?

The question now becomes whether, at this stage, a "labor dispute" existed. Collaterally, this gives rise to the question as to whether or not a "labor dispute" must be a *good faith* labor dispute. We maintain that when the Unioneer pointed to the non-union product that it was done in bad faith (and this the Union does not deny) and that *at no time* did the question as to whether the delicatessen owner was carrying a non-union product ever constitute the subject matter of any controversy between the parties. This must not be lost sight of and this Appellants cannot deny!

The Appellants now, with admitted bad faith and without there being any dispute over *any* product, hope to cut off a full hearing on the merits. By filing a Motion to Dismiss and testing out the question by not relying on the record but by arguing all over the place, in drawing any inference they like, they hope to avoid a trial where these matters can be determined. If a labor union can by its own fiat label any fact situation wherein the Union is involved a "labor dispute" and then by the technique of a Motion to Dismiss avoid a hearing, a procedure will have been approved which hardly comports with due process. If this labor union bona fide maintains that this case involves a "labor dispute", it should have no hesitancy in bringing the proof out in the open.

Point IV. The Complaint as Filed by the Plaintiff and Construed by the Court Below Did Not Disclose a "Labor Dispute."

We maintain the District Court had jurisdiction and power to order an injunction against the Appellants *upon the Complaint as filed*. Our Complaint proceeded upon the theory that there was no valid "labor dispute"; it was drafted to show upon its face that there was no such dispute. Its allegations show a difference between the Union and Wagshal arising out of: (1) the refusal of Wagshal to pay a sum owed to Hinkle's Bakery in an amount the bakery driver contended Wagshal owed. Wagshal maintained she owed a lesser sum in the amount of \$12.12; (2) the petition further alleged that the Union objected to "a certain non-union made item". There is no identification of the item. There is no allegation in the Complaint from which any reasonable inference can be drawn one way or the other as to what that particular non-union made item may have been. It could have fallen into one of two classifications. On the allegations of the Complaint it might *arguendo* have been an item in which there existed a unity of interest under that branch of the law as declared; under another, the item would have no unity of interest with anything with which the Bakery Drivers Union was interested.

The District Court possesses general jurisdiction to award injunctions. If any limitation upon that jurisdiction exists, it must be found in the Norris-LaGuardia Act. The Norris-LaGuardia Act deprives the District Court of jurisdiction to award injunctions in "labor disputes" unless in accordance with the terms of that Act. Therefore, if no labor dispute is disclosed upon the face of this Complaint, then the Norris-LaGuardia Act does not apply. Does the District Court not have jurisdiction, therefore, at least to examine and analyze the allegation of the Complaint to determine whether or not it discloses upon its face the

existence of a valid "labor dispute"? Assuredly it has that jurisdiction. If, therefore, the Court determines that no valid "labor dispute" exists, after analyzing the Complaint, then why does the Court still not retain jurisdiction to order an injunction? The District of Columbia Code gives the Court the power specifically to issue this injunction. The Complaint complied with the Rules of Court in the manner of its drafting. If there is no "labor dispute" shown, the Complaint is substantially sufficient and the Court had the jurisdiction to issue the order which it issued.

The Appellants argue that the Norris-LaGuardia Act is so broad both in its language and intent that the Court is deprived of all jurisdiction to issue injunctions against labor unions once the petition discloses even by a prayer for relief that an injunction is sought; that from that point the Court must compel compliance with the Norris-LaGuardia Act. With this contention we disagree. We maintain what has been said heretofore, that no Court can read into the language or intent of the Norris-LaGuardia Act the broad purpose of Congress to strike from the jurisdiction of the District Court all right to issue injunctions for any reason against a labor union.

If we are sound in this, then this Court must determine whether the refusal upon the part of Wagshal to meet the demands of the Union driver to pay the bill to Hinkle in the full amount which he demanded constitutes a valid "labor dispute". As to this the Complaint discloses that Wagshal was in contractual relations with the Bakery Driver or Union at no time; that for several years Wagshal had been buying bread from Hinkle and paying Hinkle and that the relationship of vendor and vendee existed between these two; that the Union and the Bakery driver were strangers to that relationship; and that neither Hinkle nor the bakery driver could bring to bear upon Wagshal the full force of the strength of the Labor Union, with all the rights accorded to labor to enforce their demands,

as a collection agency. If Hinkle asked the Union to collect the bill then the Union stepped aside from its character as a labor union and became a mere volunteer as said collection agency to aid Hinkle in obtaining his demands rather than have the claim determined by due process of law in the courts. If the Union contends that it was in contractual relations with Wagshal because of a side contract of which we have no knowledge between the Union and Hinkle to the effect that all moneys for bread sold on the route of the driver belonged to the driver and all liabilities therefor became the obligation of the driver, then the Union again stepped out of its character as a Union and becomes only the vendor of the bread with the responsibility to make collections in accordance with law for amounts owed for the sale thereof just as any other vendor or citizen. It cannot utilize those powers which the law has given the Union to enforce its demands for better wages and working conditions when in truth and in fact it is merely acting to collect a bill.

The Court must further decide whether the broad, general allegation of an objection to a certain non-union made item on the shelves of Wagshal constitutes the basis for a valid "labor dispute". This case was heard on a Motion to Dismiss. As said heretofore all the allegations of the Complaint are taken as true. In reply to the Motion to Dismiss and in support of the Motion for preliminary injunction, affidavits were submitted. Appellants now contend that the Court cannot refer to affidavits in the determination of the Motion because the Norris-LaGuardia Act specifically prohibits that reference. To determine the unity of the non-union made item it is necessary to refer to the affidavit of Benjamin Wagshal and if such reference is made, then the Court had the right to consider all of the affidavit. The transcript of the argument will show that *Counsel for Appellants* first imported the contents of the affidavits into the argument in the Court below. Therein it appears the item had been discontinued; that the dis-

pute was mooted; that no legal ground existed further for the continuance of the conduct of the Union because of the item. Defense counsel must stand, therefore, or fall upon the affidavit if he refers to it at all. Here, again, there was no counter-affidavit filed denying the facts set forth in the affidavit.

We may concede for the purpose of the argument that if the petition had disclosed the identity of the non-union made item to be one in which there existed a unity of interest and perhaps with reference to which the Union was then in dispute that the allegation might supply the definition of a valid labor dispute. In this case, however, there is no identity of such item. Neither is there any allegation that *any dispute existed* with regard to this item or similar items over which the Bakery Drivers Union might have jurisdiction or with respect to which it might be said that the Union was in competition or dispute. With this broad, general allegation alone in the Complaint can it be said that it discloses on its face sufficient information for the Court to deny the Injunction if otherwise it would grant it? It is submitted that defense counsel should have filed a Motion to make the Complaint more specific and definite, and to compel the Plaintiff to disclose the identity of the item. If in response to that Motion there had been a disclosure of an item bearing the relationship of "unity of interest" hereinbefore mentioned, then there might be some foundation upon which the defense might move for the dismissal which they sought in the face of the Complaint as drawn. It seems, therefore, that this Court must analyze and examine this particular allegation in the light of what has been said heretofore.

Point V. There was No Need for Findings of Fact, the Pleadings Being Uncontroverted.

Appellants in their Brief speak of the failure of the Court below to make findings of fact. They rely on the

Norris-LaGuardia Act (Sec. 9) but obviously the Norris-LaGuardia Act would not control unless a "labor dispute" existed. We say that this was a normal non-jury case wherein Rule 52 of the Federal Rules of Civil Procedure controlled if the facts were controverted. No evidence was taken. No Answer was filed. No counter-affidavits were filed. What facts could the Court find? All the facts were admitted by Appellants. Certainly the Court was not required to pick and choose from ultimate and basic fact allegations in uncontroverted pleadings and affidavits. The only thing the Court below had to do was determine whether a "labor dispute" existed on the uncontroverted record. It found that none existed. That was the end of it. The injunction, therefore, rightfully issued.

Point VI. The Truck Driver was Rendering Services to Hinkle, Not to Wagshal.

Appellants confuse the issues throughout their brief. It is rather loosely asserted that the bakery truck driver was rendering services (Appellants' Brief, 10-12) to the delicatessen owner. One need not be deeply steeped in scholastic metaphysics to see the fallacy in such reasoning. The truck driver was obviously not rendering a *service* to the delicatessen owner. He was merely acting as the agent of a bakery owner who was *selling bread* to the delicatessen owner. Thus, rather than rendering a service, he was acting for someone who was selling goods. If he rendered a service to anyone, it was to the bakery owner, Hinkle. Or, on Appellants' theory of the case, the truck driver was himself selling bread or goods to the delicatessen owner. So that the argument that this was a "labor dispute" affecting employment (pages 10, 11) and involved rendering services to the delicatessen owner (page 12) is clearly specious. Again we ask why is this labor union not frank enough to say that this pitched bat-

tle arose out of the refusal of Wagshal to pay \$12.12 more? The union well knows that there was no dispute of any kind until Wagshal so refused and then decided, rather than go to Court on the theory that it was the creditor and sue for the \$12.12, to block the delivery of *all* bread to the delicatessen, threaten to block the delivery of all dairy products and all other merchandise, even to the point of blocking interstate fairway express deliveries. Some of us get awfully tired of listening to the unctuous preachings of those who would justify, countenance and defend such conduct on the part of any institution, whether it be labor union, bank or public utility.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for the reason that neither the Order granting a preliminary injunction nor the Order overruling the Motion to Dismiss the Complaint was a final order within the meaning of the jurisdictional statutes. In all other particulars Appellee respectfully submits the Court Below acted in accordance with law and its actions should be affirmed.

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